Hod Carriers and General Laborers Union, Local 242, affiliated with Laborers International Union of North America, AFL–CIO *and* Johnson Western Gunite Company and Cement Masons, Local 528, affiliated with the Operative Plasterers' and Cement Masons' International Association, AFL–CIO. Case 19–CD–465

May 10, 1993

DECISION AND DETERMINATION OF DISPUTE

BY CHARIMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The charge in this Section 10(k) proceeding was filed December 14, 1992, and amended December 16, 1992, by Johnson Western Gunite Company (the Employer) alleging that the Respondent, Hod Carriers and General Laborers Union 242, affiliated with Laborers International Union of North America, AFL–CIO (Laborers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Cement Masons, Local 528, affiliated with the Operative Plasterers' and Cement Masons' International Association, AFL–CIO (Cement Masons). The hearing was held on January 6 and 7, 1993, before Hearing Officer S. Nia Renei Cottrell.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.[1]

I. JURISDICTION

The Employer, a California corporation, is engaged in applying shotcrete (a cement-like product blown through a hose and often referred to as air-placed mortar) in construction projects throughout the United States. During the 12 months preceding the hearing, the Employer received gross revenues in excess of $1 million. During the same period, the Employer purchased goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Washington, and performed services valued at $50,000 or more for customers who are directly engaged in interstate commerce. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and the Cement Masons are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

This dispute arose on a construction project at the University of Washington Health Science Center in Seattle, Washington. SDL corporation, a general contractor, subcontracted to the Employer a project at the Health Science Center for construction of basement walls.

The walls were to be done by the shotcrete method and were to have a wood float finish. A typical crew used in applying shotcrete consists of a foreman, pump operator, nozzleman, blowpipe person, hose puller, rodman, and two or three laborers to clean up. The shotcrete (a mixture of sand, cement, pea gravel, and water) is delivered in a Red-I-Mix truck. It is then pumped through a small concrete pump, hydraulically pushed through a hose, mixed with compressed air at the nozzle, and pneumatically propelled at high velocity against dirt, footings, and rebar to form a wall. The blowpipe person cleans ahead of the nozzle and also removes excess material with an airhose. The rodman, using a long knife-like rod, cleans the joints, removes the excess shotcrete, and grades the walls to the contract specifications. The surface is then very rough but can be left that way. Sometimes, as here, a smoother finish is desired, and an employee with a wood float fills in small holes in the rodded wall and smooths the surface. The float is frequently handled by the rodman. The wood float finish is for aesthetic purposes only, and the work is intermittent.

On or about October 15, 1992,[2] Joe Harrington, business agent for the Cement Masons, went to the office of Ronald Coleman, regional manager at Johnson Western Gunite, to see if Coleman was going to use cement masons to do the wood float finish work. Coleman told him that he had not made up his mind but that most likely he would assign the work to laborers. Coleman testified that he had similar conversations with Harrington on at least two subsequent occasions.[3]

[1] On February 8, 1993, the Cement Masons filed a motion to reopen the record for introduction of the 1992–1995 Agreement Between Associated General Contractors Washington and Washington and Northern Idaho District Council of Laborers (E. Exh. 3). We find it unnecessary to rule on the motion because it is moot. E. Exh. 3 was included with the official exhibits. Subsequent to the Cement Masons' motion, the court reporter (as well as the Employer) submitted to the Board pp. 38A–38Q which had been erroneously omitted from the transcript and which, inter alia, reflected the admission of E. Exh. 3 into the record. In order to eliminate any confusion on this matter, we rule that E. Exh. 3 and Tr. 38A–38Q are part of the official record of this proceeding and, therefore, the record need not be reopened to receive them.

[2] All dates are in 1992 unless otherwise specified.

[3] At the hearing the parties stipulated that on at least two occasions, including October 15 and November 15, representatives of Cement Masons demanded the float finishing work. The parties further stipulated that pursuant to its agreement with Johnson Western Gun-

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The Employer assigned the shotcrete process, including the wood float finishing, to employees represented by the Laborers. Coleman received a letter from M. Lee Price, attorney for the Cement Masons, requesting arbitration. Coleman called Gary Hix, business manager for Laborers, on November 23 or 24, and told him about the letter. Hix told Coleman that the Laborers would have real problems with a change of assignment to Cement Masons, and the Laborers would ''shut him down or whatever it took to take care of the problem, take care of our work.''[4] Hix subsequently sent a letter dated December 1, confirming that if the Employer changed the work assignment, the Laborers would ''pursue the appropriate action to resolve this matter, including legal and/or economic action.''

B. *Work in Dispute*

The work in dispute, as stipulated by the parties at the hearing, involves the assignment of wood float finishing of the shotcrete and/or gunite process assigned to and claimed by employees represented by Hod Carriers and General Laborers Union Local 242, affiliated with Laborers International Union of North America, AFL–CIO, which work is located at the University of Washington Health Sciences Complex, H-Wing Addition. The parties further stipulated that they do not agree that shotcrete and gunite are synonymous.[5]

C. *Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Laborers violated Section 8(b)(4)(D) of the Act. The Employer further contends that the work in dispute should be awarded to employees represented by Laborers on the basis of the collective-bargaining agreement, economy and efficiency, relative skills, area and industry practice, and employer preference and practice. The Employer seeks an award coextensive with the geographical jurisdiction of Cement Masons because both Laborers and Cement Masons continue to and will continue to claim this work, and Laborers has demonstrated a proclivity to engage in unlawful conduct in order to ensure that the disputed work is assigned to employees it represents.

Laborers contends that its collective-bargaining agreement covers the disputed work, and that the Employer properly assigned the work to employees represented by the Laborers. Laborers also contends that the Board should award the work to employees it represents based on area and industry practice, skills and training, employer preference and practice, and economy and efficiency.

At the hearing, the parties stipulated that there was no agreed-upon method for voluntary resolution of the dispute. However, in its brief Cement Masons argues that the Board should remand this matter to the parties because the Employer's agreements with the Cement Masons and with the Laborers establish a voluntary method for resolving jurisdictional disputes by referring them to the International Unions. Should the Board reach the merits of the dispute, Cement Masons contends that the employees it represents have the necessary skills to do the work, and that the work should be awarded to them on the basis of the collective-bargaining agreement, an AFL–CIO award, and an arbitration award.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and that there is no agreed-upon method for the voluntary adjustment of the dispute.

At the hearing the parties stipulated that on at least two occasions, including October 15 and November 15, authorized representatives of Cement Masons demanded the float finishing work. The parties also stipulated that on November 23 or 24, Laborers' agent Gary Hix demanded that the entire shotcrete process, including the float finishing work, continue to be assigned to employees represented by Laborers. Testimony adduced at the hearing supports these stipulations. Therefore, we find that there are competing claims to the work.[6]

The parties further stipulated at the hearing that on November 23 or 24, Hix asserted that if the assignment were changed, Laborers would strike or cause to be struck the jobsite at the University of Washington Health Sciences Complex, H-Wing Addition. This stipulation is corroborated by undisputed testimony that the Laborers' business manager told the Employer's regional manager that if the Employer changed the work assignment, the Laborers would shut the job down. As indicated above, the Laborers reaffirmed this assertion by letter of December 1. Therefore, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

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ite Company, the Cement Masons filed a grievance over the disputed work. Edward Lutz, business manager for Cement Masons, testified at the hearing that the position of his Union is that the wood float finishing on shotcrete is their work, and that he claims it and will continue to claim it.

[4] At the hearing the parties stipulated that on November 23 or 24, Hix asserted that if the assignment were changed, Laborers would strike or cause to be struck the jobsite at the University of Washington Health Sciences Complex, H-Wing Addition.

[5] Although gunite is not being used in the work in dispute, the parties included it in their stipulation defining the work in dispute.

[6] Chairman Stephens notes that Cement Masons did not raise any argument which would trigger for him the application of the principles stated in his dissent in *Laborers Local 731 (Slattery Associates)*, 298 NLRB 787, 790 (1990).

The parties stipulated at the hearing that there is no agreed-upon method for voluntary resolution of this dispute. In its brief, however, Cement Masons argues that all parties through their respective collective-bargaining agreements contracted to submit jurisdictional disputes to the International Unions. The Cement Masons urges the Board to remand the matter to the parties.

We find, however, that the contracts do not mandate the same method of resolution. The Cement Masons' contract with the Employer specifies that if the Union and the Employer are unable to reach agreement on a jurisdictional dispute after 48 hours, the matter shall be referred to the two International representatives, who shall confer with the Employer for settlement. The Cement Masons' contract further provides that unresolved disputes will be submitted to arbitration. The Laborers' agreement provides only generally that jurisdictional disputes not resolved by the Unions shall be referred to the International representatives. Unlike the Cement Masons' agreement, the Laborers' agreement contains neither the 48-hour provision nor the arbitration provision.[7] These differences are significant enough to preclude a finding that all parties have agreed to be bound by a single mutually agreed-upon procedure. *Iron Workers Local 86 (Kulama Erectors)*, 264 NLRB 166, 168 (1982). Therefore, we find that there is no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certification and collective-bargaining agreements

There is no evidence that either Union was ever certified by the Board to represent the employees of the Employer, and at the hearing the parties stipulated that there is no outstanding Board certification. Laborers and Cement Masons both have collective-bargaining agreements with the Employer that arguably cover the work. This factor does not favor awarding the work in dispute to either group of employees.

2. Company preference and past practice

The Employer has had a contract with the Laborers for many years, has historically used employees represented by the Laborers to do shotcrete work, and prefers to continue to assign the entire shotcrete process including the wood float finish to employees represented by the Laborers. This factor favors awarding the work in dispute to employees represented by Laborers.

3. Area and industry practice

The Cement Masons' business manager testified that over the last 20 years the Cement Masons has had contracts with three area contractors performing exclusively shotcrete or gunite work. He stated that Cement Masons currently has a contract with one such contractor in addition to the Employer, but he was unable to estimate the percentage of area shotcrete work that that contractor performs. The Employer, which is responsible for approximately 60 percent of the total shotcrete work in the area, uses laborers to do its shotcrete work, including wood float finishing. A Laborers' business manager named five other companies in the area using laborers to perform shotcrete work, including the wood float finishing. The factor of area practice favors awarding the work in dispute to employees represented by the Laborers.

The business manager of Allied Workers Local Union 345, affiliated with Laborers International Union of North America, AFL–CIO,[8] testified that, based on his 22 years of personal experience and his contact with members working throughout the country, the industry practice is for laborers to do the shotcrete process, including the wood float finish. Anthony Federico, president of Superior Granite Company of which Johnson Western Gunite is a subsidiary, testified that the laborers have the necessary experience and training to do the wood float finish, have always done it, and that it is definitely not industry practice to use cement masons. The Cement Masons offered testimony that employees it represents have done finishing of shotcrete, but it presented no specific evidence concerning industry practice. The factor of industry practice favors awarding the work in dispute to employees represented by the Laborers.

[7] The Laborers' agreement also provides for adjudication of jurisdictional disputes in accordance with the current Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (The Plan) except where, as here, the dispute involves an employer or a union not subject to the procedures established by the Impartial Jurisdictional Disputes Board. The parties have stipulated that the Employer is not subject to ''The Plan.''

[8] Local 345 is a specialty local, chartered in 1934, that has 300 members who perform gunite and shotcrete work throughout the United States.

4. Relative skills and training

The Laborers regard shotcrete work as a specialty. Northwest Laborers Employers Training Trust Fund, a joint labor management trust fund for training construction laborers, has three training sites in the State of Washington, including a 16-acre site at Kingston which provides classroom and hands-on training for laborer skills. Included are training courses specifically in concrete work and the basics of finishing and use of various types of floats and trowels. Thereafter, the workers receive further on-the-job training in the application of these skills to the shotcrete process. When the Employer calls the Laborers' hiring hall, he can request someone with this specialty and obtain a laborer with this skill rather than the top man on the list. The Cement Masons do not regard wood float finishing as a specialty, just a general classification for cement masons. There is no evidence of a Cement Masons training program similar to that of the Laborers. This factor favors awarding the work in dispute to employees represented by the Laborers.

5. Economy and efficiency of operations

The Employer's wood float finish work is intermittent, generally 1-1/2 to 2 hours a day on those projects where it is required. As indicated above, the Employer usually uses laborers crews consisting of eight people who are capable of performing several different tasks, including the wood float finish. These crews work as a team and also travel as needed. If the Employer were to use an employee represented by the Cement Masons to do the wood float finish, which is the only portion of the process that the Cement Masons claims, that employee would be idle while the rest of the crew did the shotcrete work to the point of finishing. It would also not be economical to have one person travel with the crew to do only the intermittent wood float finish. This factor favors awarding the work in dispute to employees represented by the Laborers.

6. Awards of joint boards

Cement Masons offered into evidence ''The Plan'' for Settlement of Jurisdictional Disputes in the Construction Industry which contained, inter alia, a 1924 decision holding that employees represented by the Laborers International were entitled to perform certain gunite or cement gun work but not to do the finishing if finishing tools were required. At the hearing, the parties stipulated that the Employer is not a party to ''The Plan.'' The decision is not, therefore, binding on the Employer. We also note that, according to testimony at the hearing, the decision was rendered before the advent of shotcrete.

Cement Masons also offered an arbitration decision holding that Howard S. Wright Construction violated its contract with the Cement Masons by subcontracting shotcrete work to Johnson Western Company. The arbitrator in that case specifically found that the issue was breach of contract and that it was not a jurisdictional dispute. Further, neither the Laborers nor Johnson Western Company was a party to that arbitration proceeding.

This factor does not favor awarding the work in dispute to either group of employees.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on employer preference and past practice, area and industry practice, relative skills and training, and economy and efficiency of operation.

In making this determination, we are awarding the work to employees represented by Laborers, not to that Union or its members.

Scope of the Award

The Employer requests an award of the disputed work that is coextensive with the geographical jurisdiction of Cement Masons Local 528. Generally, in order to support a broad award, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area, that similar disputes are likely to recur, and that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Electrical Workers IBEW Local 104 (Standard Sign)*, 248 NLRB 1144, 1148 (1980). We do not find that the record supports a broad award. The Board will not impose a broad award in the absence of evidence demonstrating that the union against which the broad award will lie has resorted to unlawful means to obtain work and that such unlawful conduct will recur. Id. There is no evidence of unlawful conduct on the part of Cement Masons, the Union against which the award will lie. Accordingly, our determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees represented by Hod Carriers and General Laborers Union, Local 242, affiliated with Laborers International Union of North America, AFL–CIO are entitled to perform the wood float finishing of the shotcrete and/or gunite process assigned to and claimed by Laborers at the University of Washington Health Sciences Complex, H-Wing Addition.